Qualified Immunity: 2024—2025

Sponsored by: FBA Civil Rights Law Section

Kyle J. Kaiser, Utah Attorney General's Office

Nicole Johnston, Utah Attorney General's Office

Federal Bar Association

Voice of the Federal Bar and Bench

Opinions of the speakers are their own and not necessarily the opinions of their employers or any sponsoring organizations

Fruit Ice Cream, CC-BY-NC 4.0 license. https://pngimg.com/image/5097

BEN & JERRY'S

Ice Cream Flavors | Where to Buy | Shops & Catering | Activism | About Us | What's New | Contact Us

< What's New

What the Fudge Is Qualified Immunity, And Why Does It Matter?

https://www.benjerry.com/whats-new/2020/07/qualified-immunity

Fruit Ice Cream, CC-BY-NC 4.0 license. https://pngimg.com/image/5097

The Recipe

- Quick Background on Qualified Immunity
- Qualified Immunity in the Circuit Courts, 2024-January 31, 2025
  - Statistics
  - Highlights
- A look ahead to qualified immunity issues for the rest of 2025
- Questions and comments

Qualified Immunity Background

Federal Bar Association
Voice of the Federal Bar and Bench

Thomas Hawk, “Snelgrove Ice Cream,” https://bit.ly/3THVtmW, CC BY-NC 2.0 Vxla, “Black Ice Cream,” https://bit.ly/3TT9zTH CC BY-DEED

Qualified Immunity Background

Federal Bar Association

Voice of the Federal Bar and Bench

Thomas Hawk, "Snelgrove Ice Cream," https://bit.ly/3THVtmW, CC BY-NC 2.0 Vxla, "Black Ice Cream," https://bit.ly/3TT9zTH CC BY-DEED

Qualified immunity timeline

Monroe v. Pape (1961)

Court determines § 1983 "color of law" means "badges of authority"

Pierson v. Ray (1967)

Recognizes "good faith" defense to § 1983 claim

Harlow v. Fitzgerald (1982)

Abandons subjective *Ray* test: "clearly established" law which a "reasonable person would have known"

Anderson v. Creighton (1987)

"contours of right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right."

Hope v. Pelzer (2002)

In "obvious" case where violation of pre-existing law is "apparent" no need for case on point

Pearson v. Callahan (2009)

Court may address either constitutional right or clearly established prong first

Ashcroft v. Al-Kidd (2011)

"**Every**" reasonable official

At least 8 *per curiam* opinions (2013-2019)

Only 1 reversing grant of QI.

Justices question QI

Ziglar, (2017), Baxter (2020)

QI Reversals* (2020-21)

Taylor v. Riojas **(2020)**
Lombardo v. St. Louis (2021)

More *per curiam* QI denial reversals

City of Tahlequah, Okla. v. Bond (2021)
Rivas-Villegas v. Cortesluna (2021)

Justices question more, but silence

Ramirez v. Guadarrama, 2022 (Sotomayor, Breyer, Kagan, diss. from den.); *K.S. v. K.C. Bd. of Police Comm'rs* (2023) (Sotomayor, J., diss. from den); *NRA v. Vullo* (2023) (no QI)

The *Saucier* Two-~~Step~~ Scoop

Saucier v. Katz mandated a two-step sequence for resolving government officials' qualified immunity claims. A court must decide

(1) whether the facts alleged or shown by the plaintiff make out a **violation of a constitutional right**, and

(2) if so, whether that right was "**clearly established**" at the time of the defendant's alleged misconduct

What's First?

Pearson v. Callahan, 555 U.S. 223 (2009)

Supreme Court held that "the *Saucier* procedure should not be regarded as an inflexible requirement"

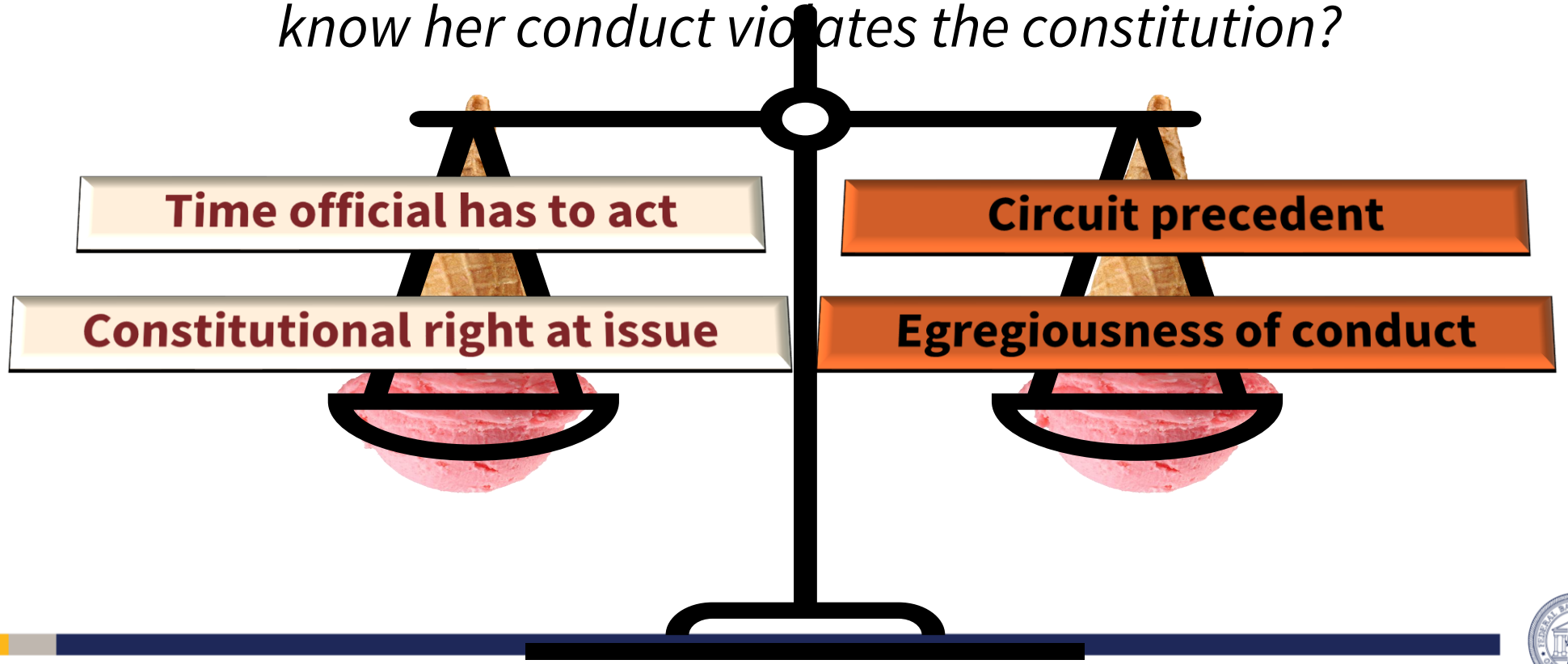
Held that lower courts have the discretion to rule on if the law was clearly established prior to determining if a constitutional violation occurred

Qualified immunity – State of the law

- "We do not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate." *Ashcroft v. al-Kidd*, 563 U.S. 731 (2011)
- "[t]he contours of [a] right [are] sufficiently clear" that every "reasonable official would [have understood] that what he is doing violates that right." *Ashcroft v. al-Kidd*, 563 U.S. 731 (2011)
- "On-point Supreme Court or published Tenth Circuit decision [establishing unlawful conduct]" or "weight of authority from other courts must have found the law to be as the plaintiff maintains." *Cummings v . Dean*, (10th Cir. 2019)
- Unless the plaintiff can show defendant's actions were "so obviously at the very core of what the [constitution] prohibits that the unlawfulness of the conduct was readily apparent to the official." *Smith v. Mattox*, (11th Cir. 1997)

Qualified immunity --

How specific of a case do I need to show that "every reasonable" official would know her conduct violates the constitution?



Qualified immunity -- Results

"When I looked at almost 1,200 cases that were filed around the country, I found that a small proportion of those cases, less than 4%, were actually dismissed because of qualified immunity," Schwartz said.

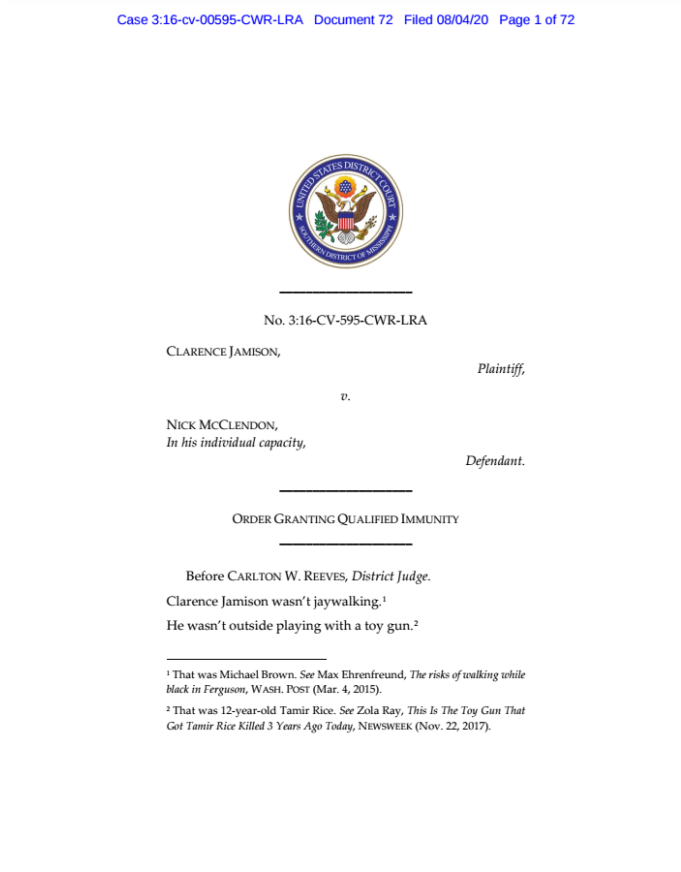
Federal Bar Association

Join the FBA & Civil Rights Law Section today!

Qualified immunity -- Effects

It “operates like absolute immunity …. But let us not be fooled by legal jargon. Immunity is not exoneration. And the harm in this case to one man sheds light on the harm done to the nation by this manufactured doctrine. … This has to stop.”

– The Hon. Carlton W. Reeves,
Jamison v. McClendon (S.D. Miss. Aug. 4, 2020)



Case 3:16-cv-00595-CWR-LRA Document 72 Filed 08/04/20 Page 1 of 72

No. 3:16-CV-595-CWR-LRA

CLARENCE JAMISON,
Plaintiff,

v.

NICK MCCLENDON,
In his individual capacity,
Defendant.

ORDER GRANTING QUALIFIED IMMUNITY

Before CARLTON W. REEVES, *District Judge.*

Clarence Jamison wasn't jaywalking.[1]

He wasn't outside playing with a toy gun.[2]

[1] That was Michael Brown. *See* Max Ehrenfreund, *The risks of walking while black in Ferguson*, WASH. POST (Mar. 4, 2015).

[2] That was 12-year-old Tamir Rice. *See* Zola Ray, *This Is The Toy Gun That Got Tamir Rice Killed 3 Years Ago Today*, NEWSWEEK (Nov. 22, 2017).

Qualified Immunity 2024-2025 Statistics

Federal Bar Association

Voice of the Federal Bar and Bench

Paul Istoan, "Ice Cream," https://bit.ly/43wjxO5 CC-BY NC 2.0

Our Recipe

(Note, while we tried to be careful, no guarantees of statistical accuracy)

Westlaw “qualified /2 immunity” unpublished Court of Appeals cases (no filtering)

Categorized the cases by circuit, procedural posture, outcome at district court, outcome at CA, primary defendant type, claims asserted

Removed irrelevant, duplicative cases (rehearings, etc.)

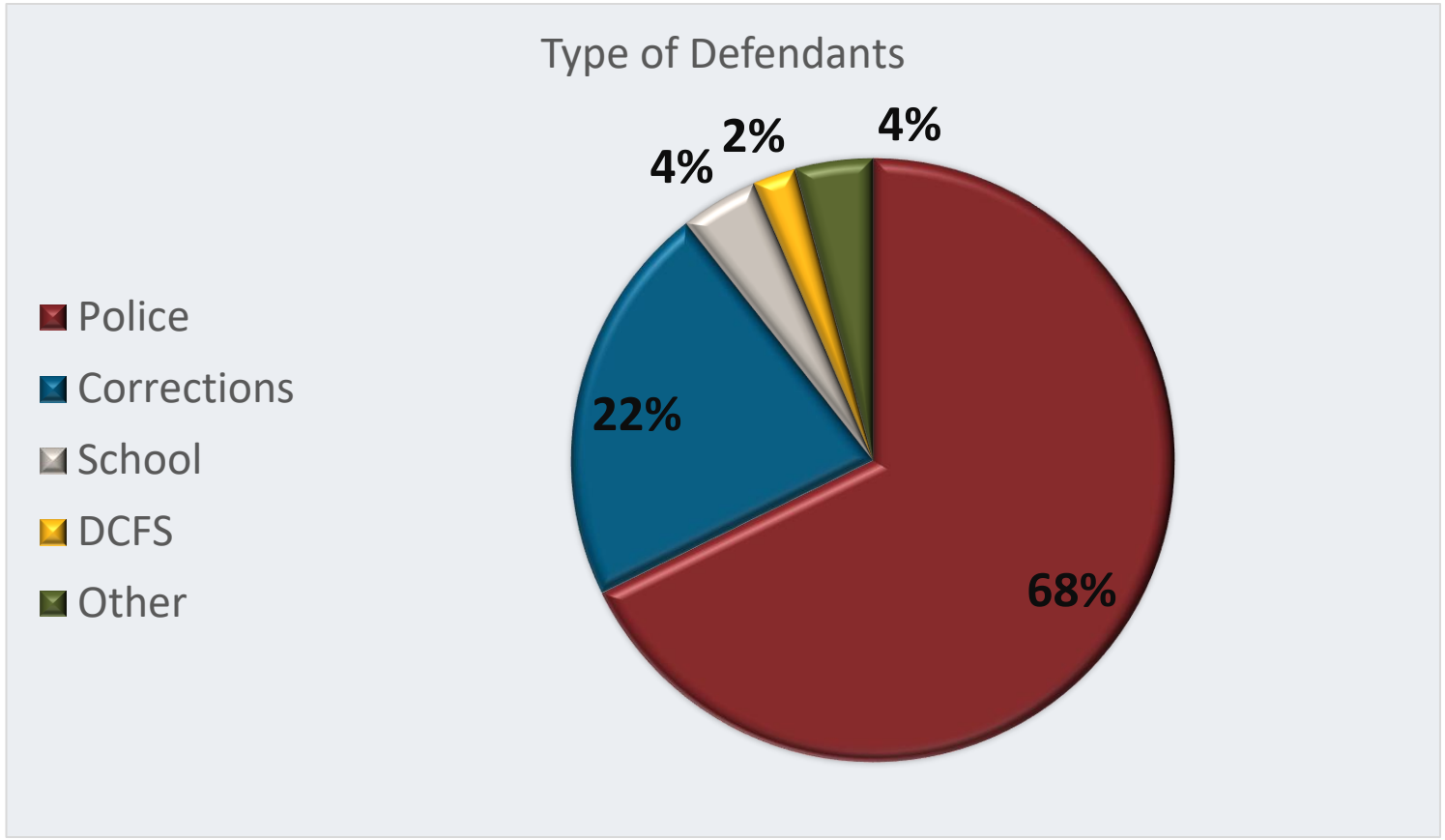
Westlaw “sy,di” search for “qualified /2 immunity,” published Court of Appeals cases, 1/1/2024 – 1/31/2025

Hornbeam Arts, “Day 249 – Sundae” https://bit.ly/4a8SM4N CC BY-NC 2.0

Qualified immunity – Statistics

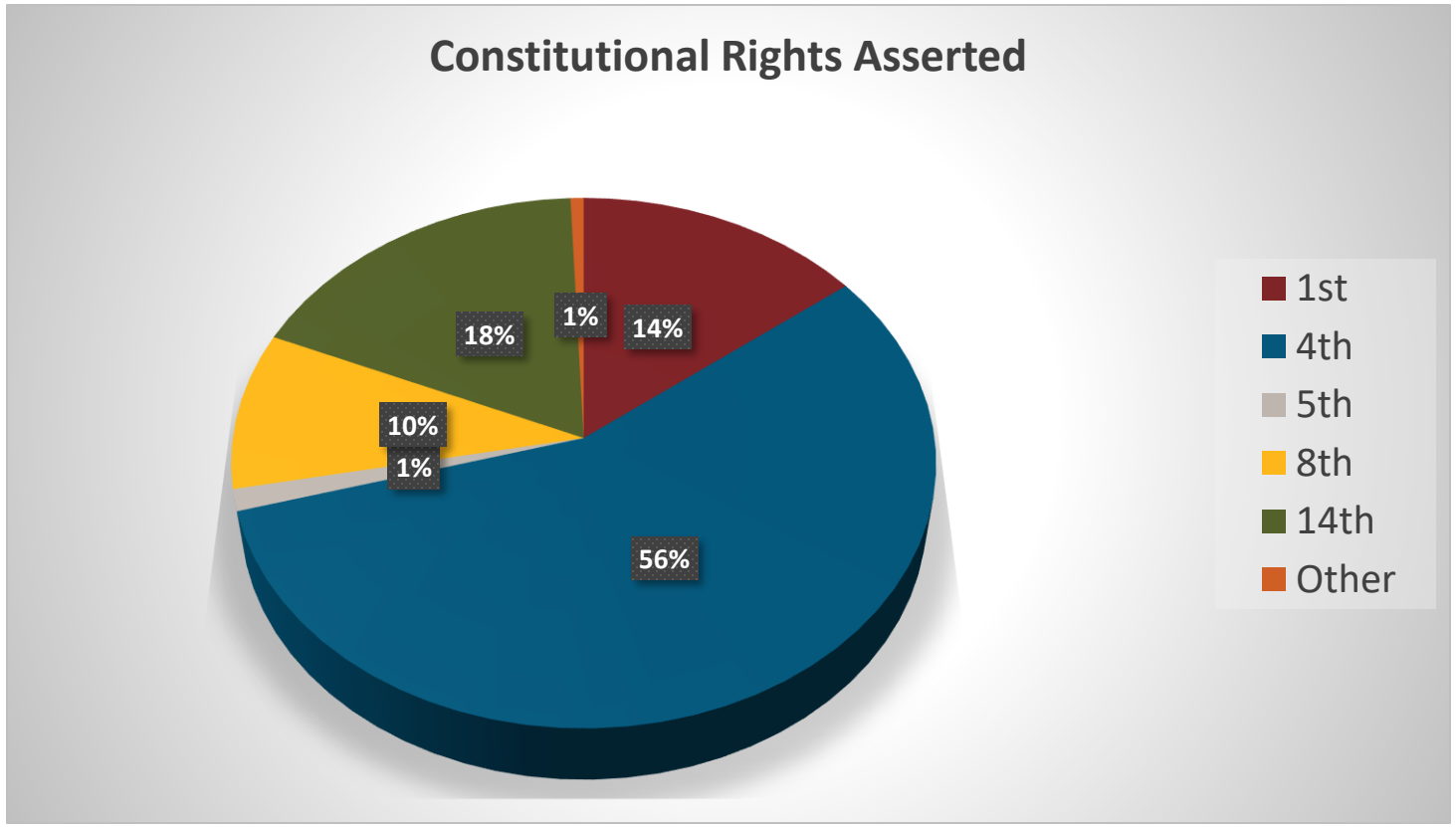
- 211 Published, Relevant, Non-Duplicative Cases

Cases by defendant type



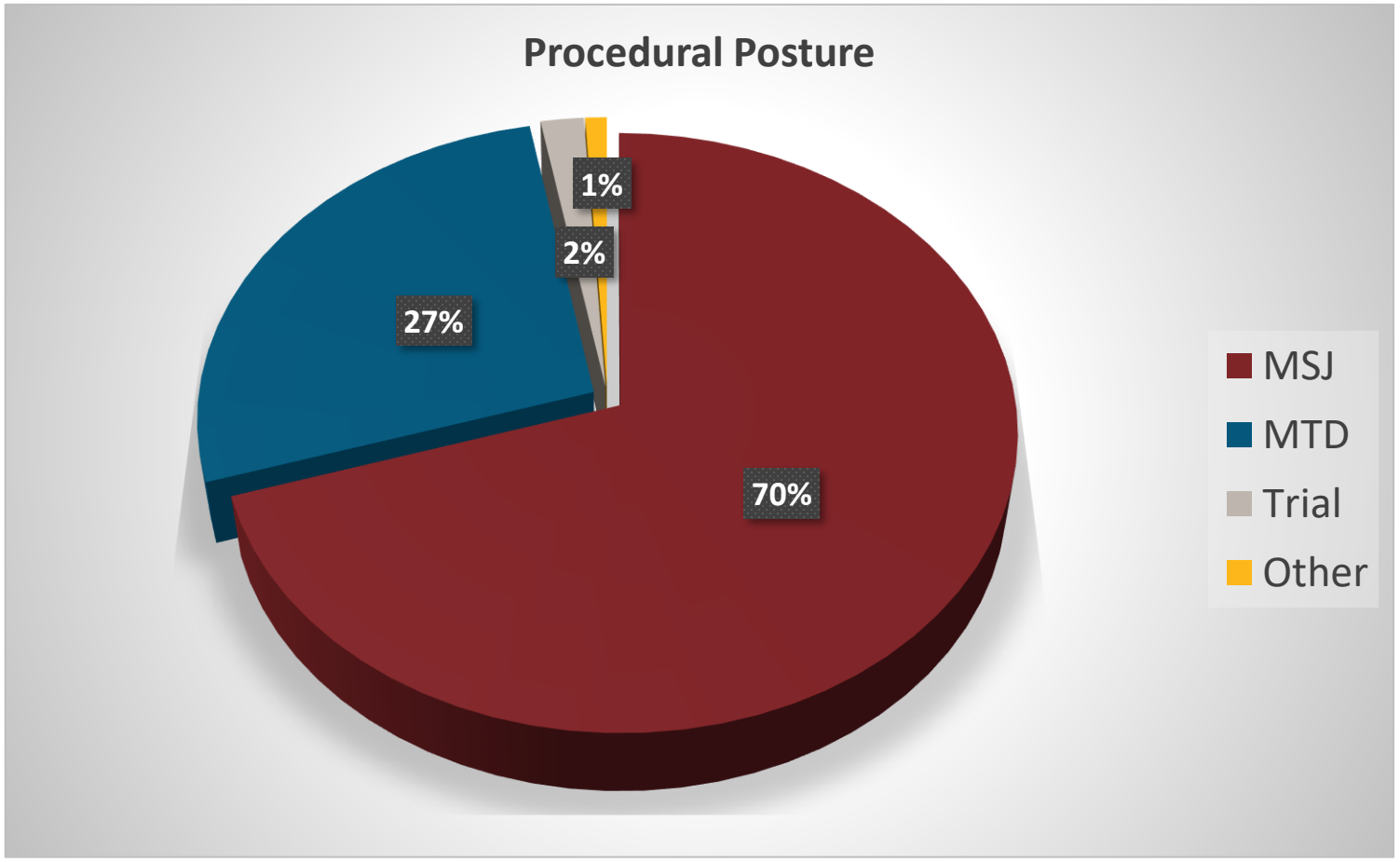
- Nearly 9 out of 10 cases involve police or corrections defendants.
- Circuits are all relatively similar, but and the 5th 6th and 8th have more corrections cases, and nearly all the school cases this year come from the 6th Circuit.
- Relatively similar to last year (the bump in school cases in the 6th Circuit is new).

Cases by claim type



- Some cases had multiple rights asserted
- Fairly consistent among the circuits; no First Amendment claims in 7th or 3rd
- Roughly the same as last year

Cases by procedural posture



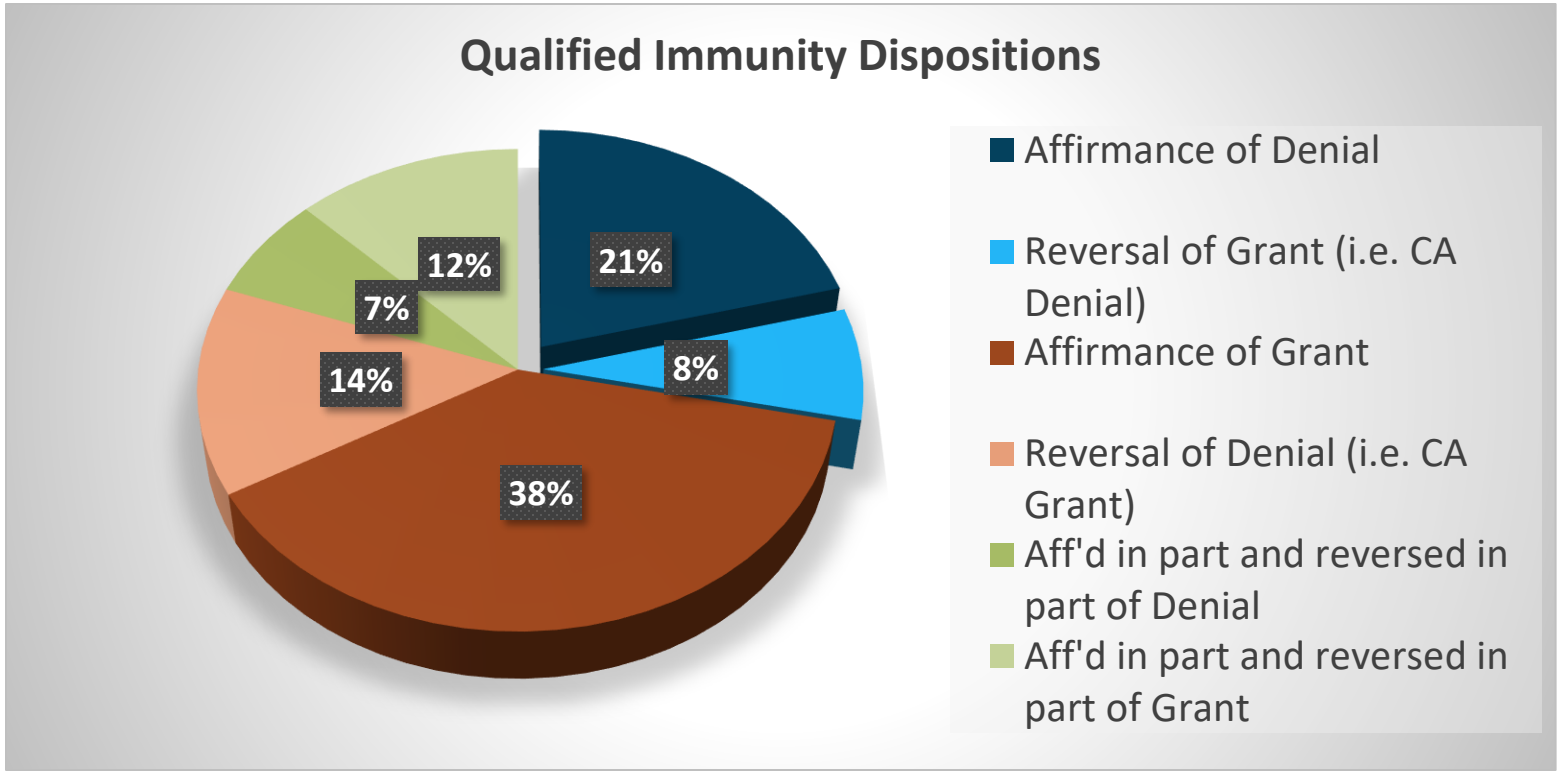
- Almost identical to last year

Decisions by Circuit

	Published Cases	Unpublished Cases (Estimate)*	Percent of QI cases published (estimated)	Circuit Population (Millions)	Total Cases / 1 million pop	Published Cases / 1 million pop
1st	10	2	83%	14.1	0.85	0.71
2nd	**6**	**28**	**18%**	**23.9**	**1.42**	**0.25**
3rd	**7**	**29**	**19%**	**23.3**	**1.55**	**0.30**
4th	**18**	**14**	**56%**	**34.9**	**0.92**	**0.52**
5th	**39**	**67**	**37%**	**37.47**	**2.83**	**1.04**
6th	**32**	**67**	**32%**	**33.49**	**2.96**	**0.96**
7th	**9**	**10**	**47%**	**25.32**	**0.75**	**0.36**
8th	**39**	**10**	**80%**	**21.89**	**2.24**	**1.78**
9th	**20**	**90**	**18%**	**61.7**	**1.78**	**0.32**
10th	12	38	24%	18.99	2.63	0.63
11th	17	58	23%	38.74	1.94	0.44
D.C.	2	2	50%	0.68	5.88	2.94
			Average			Average
Total	211	415	41%	334.48	2.15	0.85

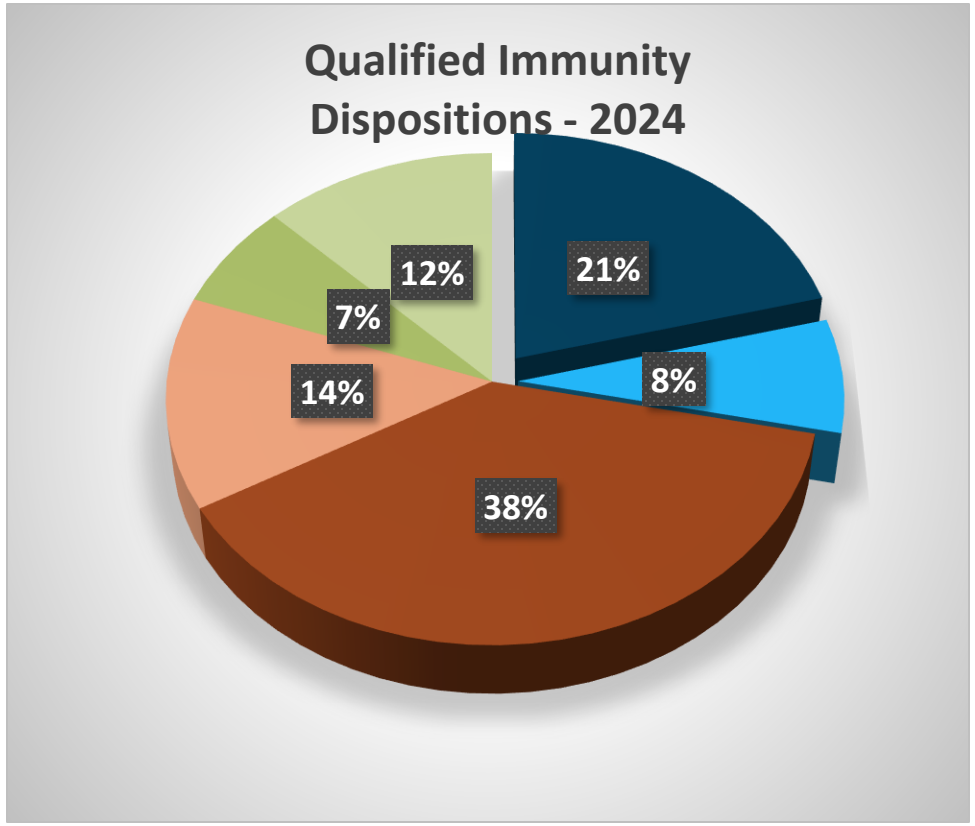
- 5th & 6th Circuits overrepresented, but 5th has fewer this year than last
- 4th, 7th under-represented (fewer than last year)
- 8th Circuit overrepresented in published cases, even higher than last year (69%)
- 2nd, 3d & 9th Circuits underrepresented in published cases
- D.C. – very small sample sizes

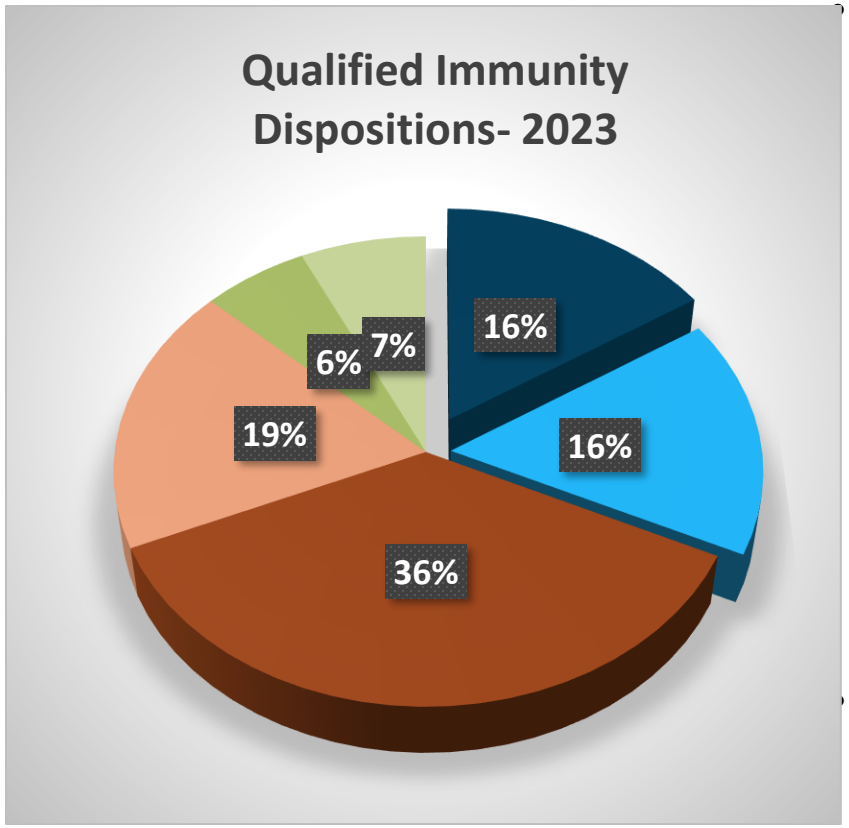
Dispositions



- 52% of cases resulted in QI being granted
- 29% resulted in QI being denied
- 19% mixed results
- ~40% reversal rate (at least in part)

Dispositions



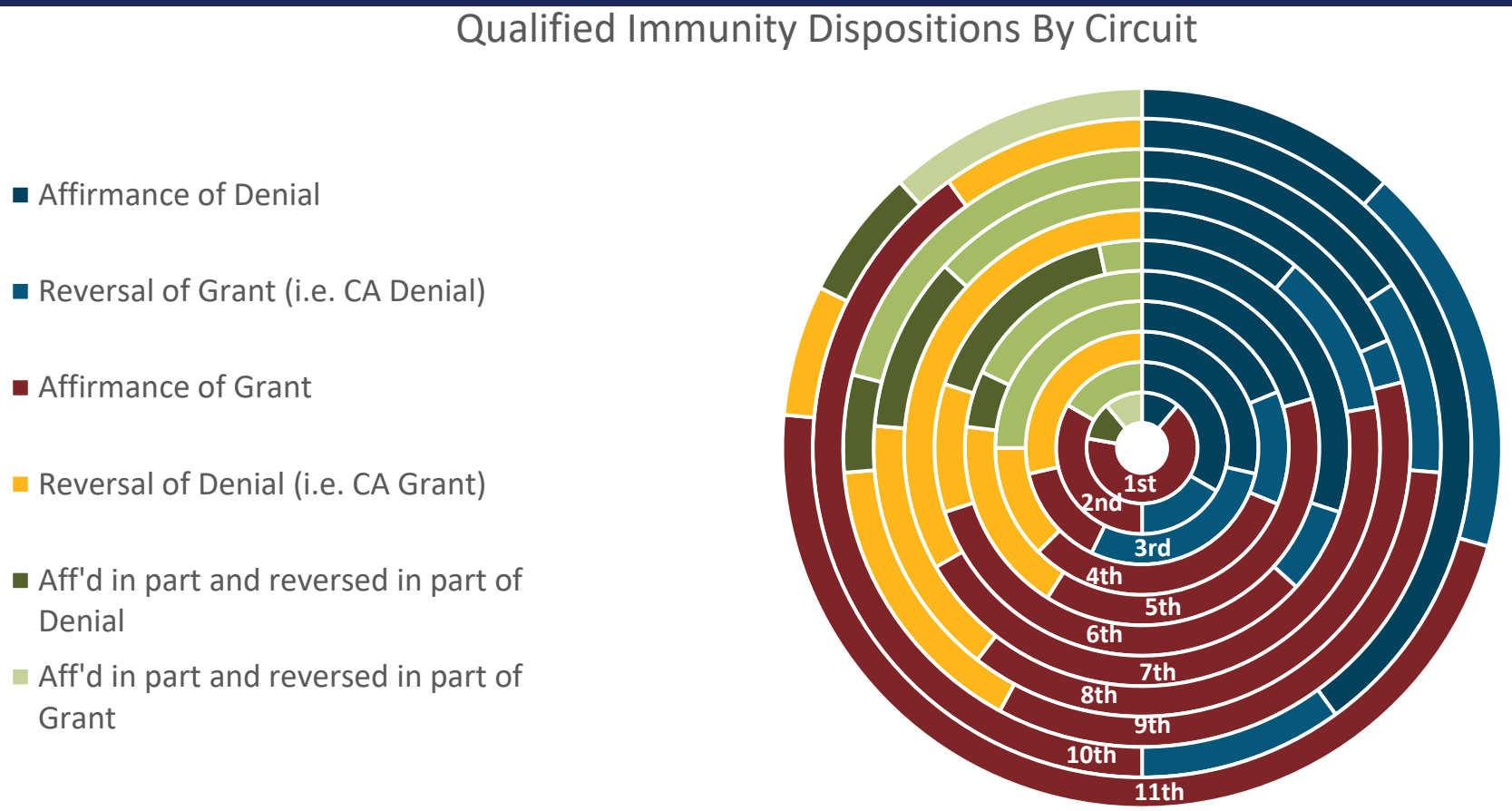


Compared to last year:

- Smaller percentage of reversals of denials (light brown) (14% vs. 19% in 2023)
- More affirmance of denial (dark blue) (21% vs 16% in 2024) but fewer reversals of grants (light blue) (8% vs 16% in 2024)
- More mixed results (19% vs 13% in 2023)

But rough proportions are about the same

Disposition by circuit



- 1st Circuit is inner donut, 11th is outer
- 2d, 3d & 10th Circuits – largest denial rate, 6th Circuit getting there
- 1st, 5th, 8th, 9th(!), and 11th lower denial rates
- (We didn't have time to cross tab to see the most likely types of cases or defendants that were given or were denied QI.)

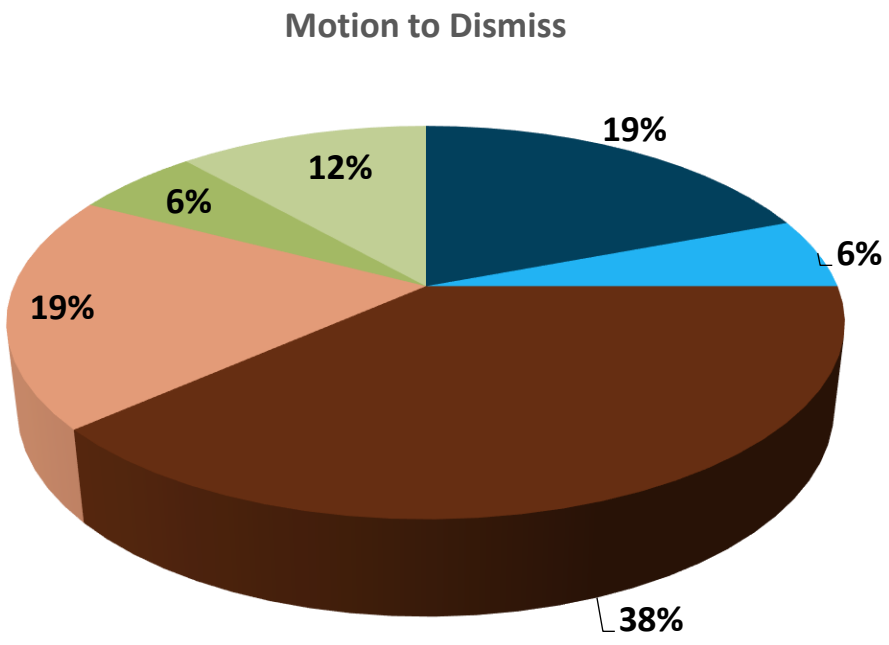
Disposition by circuit

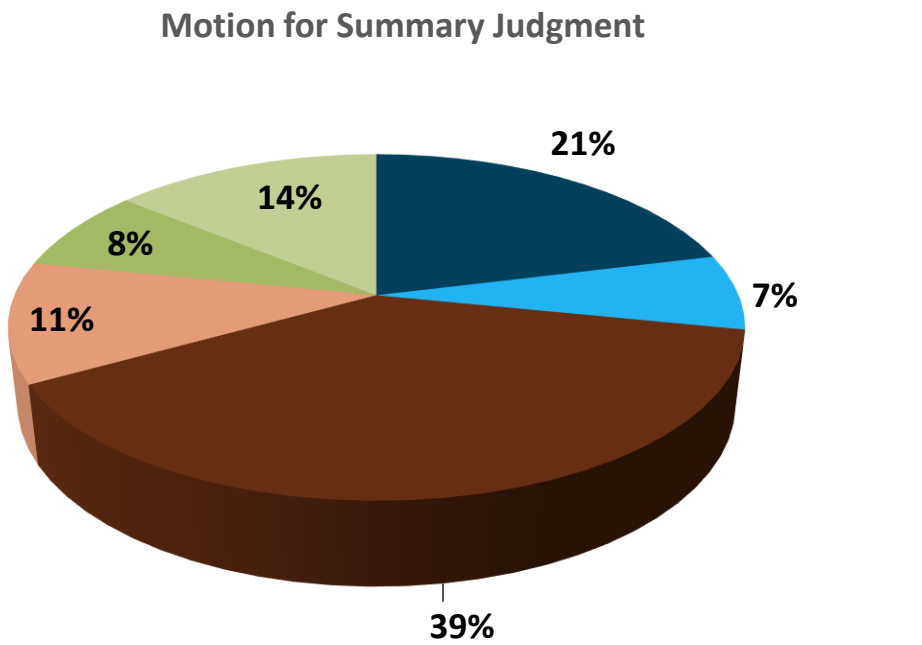
Qualified Immunity Dispositions
By Circuit - 2024

Qualified Immunity Dispositions
By Circuit - 2023

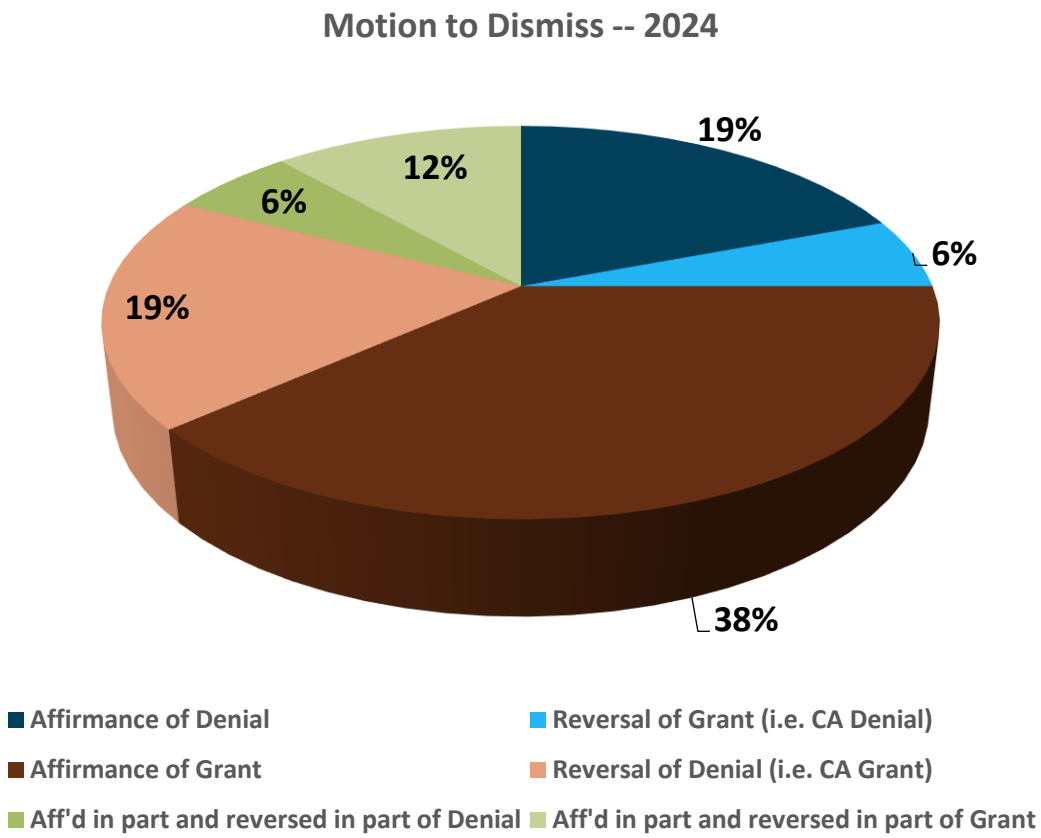
- Compared to last year:
  - 6th Circuit increased denials (only 29% last year; this year nearly 40%)
  - 7th Circuit WAY more grants (last year ~50%)

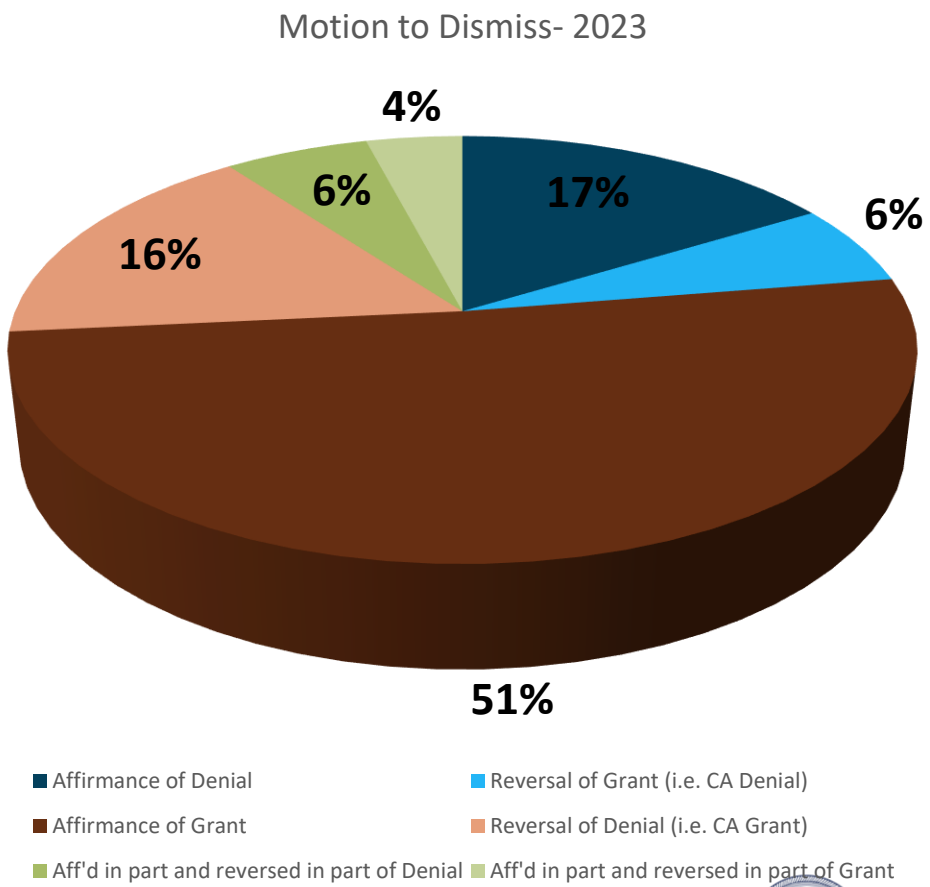
Disposition by procedural posture



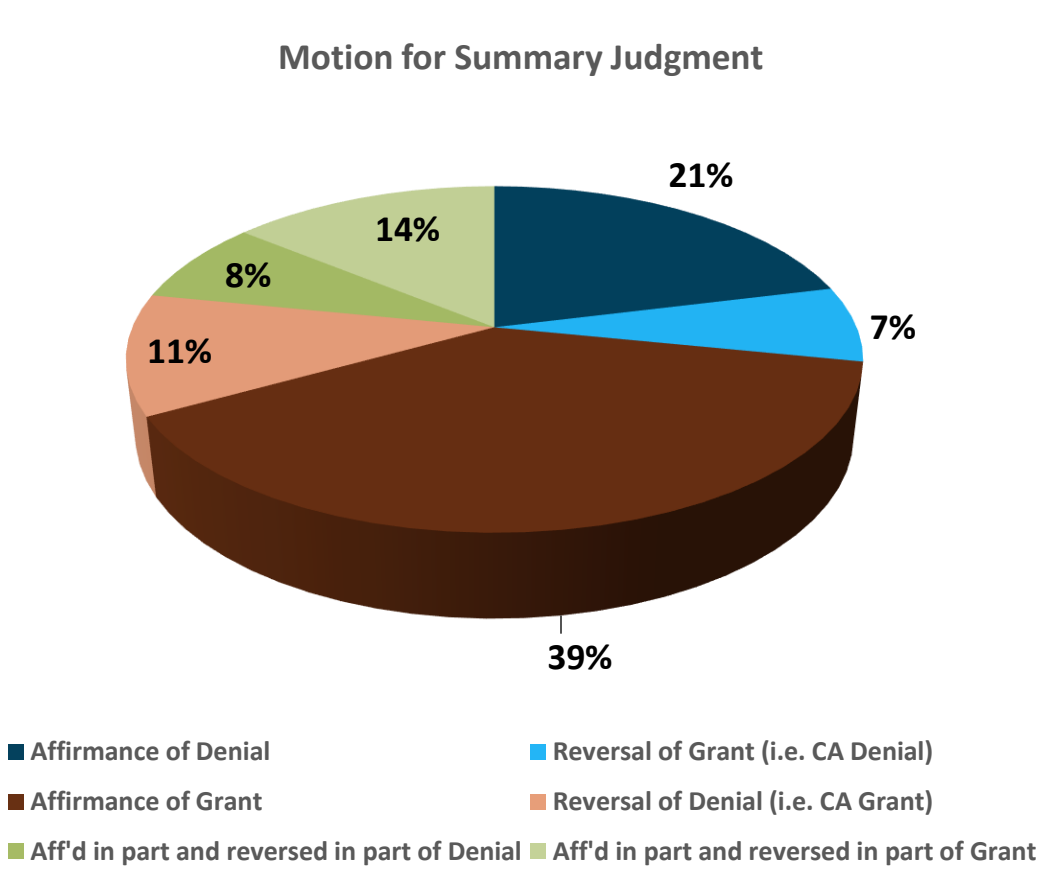


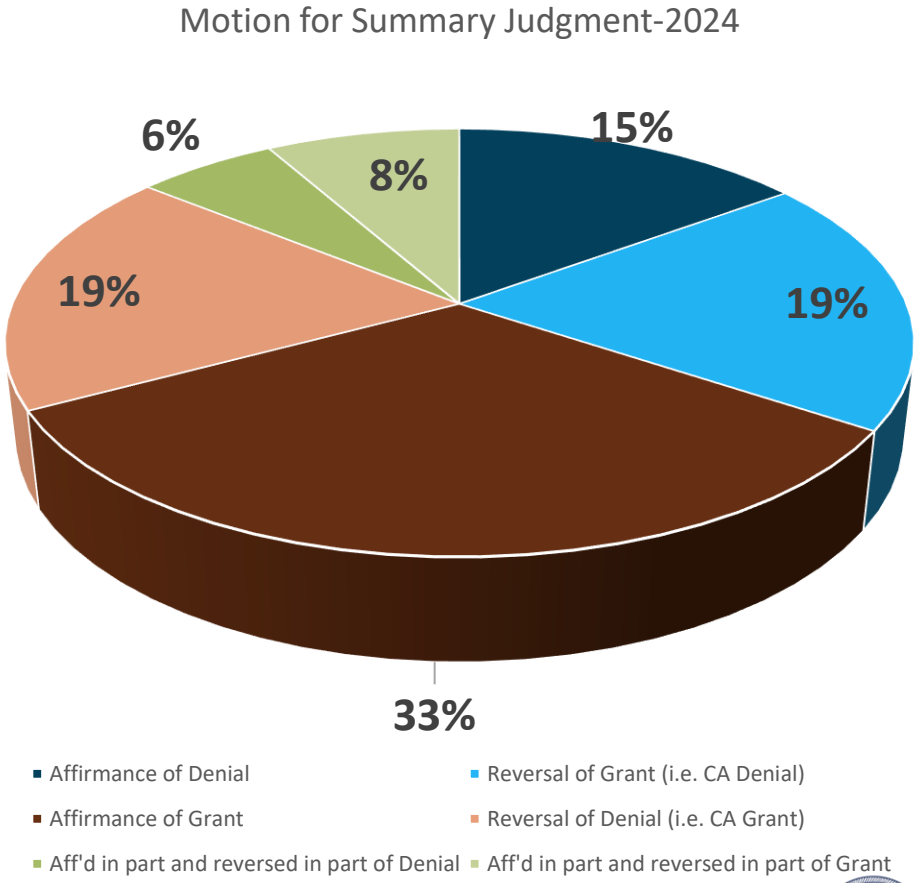
Disposition by procedural posture





Disposition by procedural posture





Qualified immunity 2024-25 statistical summary

- Supermajority police misconduct & corrections (No change)
- Supermajority brought after MSJ (No change)
- Fifth & Eighth Circuit continued oversized presence, though slightly fewer 5th Circuit unpublished cases this year
  - Why? Simply more cases? More division? Intent to move the law?
- Third & Ninth Circuit undersized presence
  - Why?
- QI denied in ~30-40% of cases *in published cases*
- 2d, 3d, & 10th Circuits – largest denial rate (largest change is 7th Circuit dropping out and 6th Circuit moving in)
- 1st, 5th, 8th 9th(!), and 11th lower denial rates
- Higher percentage of QI grant on MTD than MSJ

Selected Qualified Immunity Cases

Wetwebwork, “Ice Cream,” https://bit.ly/3IXqSfU CC BY-SA 2.0

Rupp v. Buffalo, 91 F.4th 623 (2nd Cir. 2024)

Facts:

- After a police car, driving at night without headlights on, nearly hit two pedestrians, Plaintiff called out "turn your lights on, asshole." The officer then cited Plaintiff for violating the City of Buffalo's noise prohibition.
- Plaintiff brought a claim that the arrest was made in retaliation for the exercise of First Amendment, free speech rights.

Holding:

- "Given that the intent of the Buffalo noise ordinance is in part to "promote health, safety and welfare" in the City, we see no valid basis for concluding that it was intended to criminalize a brief shout intended to urge a person driving in the dark without headlights--especially when his vehicle has just nearly hit two pedestrians--to turn on his lights."

Thomas-El v. Francis, 99 F.4th 1115 (8th Cir. 2024)

Facts:

- Thomas-El requested toothpaste, soap, and deodorant from prison staff because he could not afford them. Over the course of 5 months, still without toothpaste, Thomas-El visited the medical facility complaining of a cavity, tooth pain, and a "rotten taste" in his mouth. He was placed on a waitlist to receive a filling.
- Thomas-El brought an Eighth Amendment conditions of confinement claim which is analyzed under a deliberate indifference standard.

Standard:

- Deliberate indifference requires (1) the alleged violation must be sufficiently serious; and (2) the official knew of and disregarded an excessive risk to inmate health and safety.

Thomas-El v. Francis, 99 F.4th 1115 (8th Cir. 2024)

Constitutional Violation Holding:

- (1) Thomas-El's allegations that he was without funds to purchase toothpaste and his nearly five months of unsuccessful repeated requests for toothpaste are sufficient to create a serious medical need.
- (2) Thomas-El sent at least two letters requesting hygiene products. Thomas-El also alleged that he spoke with prison officials in person, but they denied speaking to him or, if they spoke to him, they did not ignore or rebuff his requests. Therefore, "a genuine factual dispute existed over whether Francis and Lee subjectively knew and consciously disregarded the risk of serious harm that Thomas-El faced by depriving him of toothpaste."

Thomas-El v. Francis, 99 F.4th 1115 (8th Cir. 2024)

Clearly Established Holding:

- Previous 8th Circuit cases established that:
  - "Inmates are entitled to reasonably adequate sanitation, personal hygiene, and laundry privileges, particularly over a lengthy course of time." (887 F.2d at 137)
  - "The Eighth Amendment provides inmates the right to be free from the long-term, repeated deprivation of adequate hygiene supplies." (101 F.3d at 544)
- Therefore, it is clearly established and Qualified Immunity was properly denied.

Ramirez v. Killian, 113 F.4th 415 (5th Cir. 2024)

Facts:

- Officer Killian responded to a domestic disturbance call, entered the home where he encountered Ramirez entering from another door. Killian ordered Ramirez to "come here, get over here, get over here and face that wall." Ramirez approached the Officer who then ordered: "get over there and face that g—d—n wall, b—h," simultaneously pepper spraying Ramirez's face.
- At the same time, a pit bull entered the kitchen from another door and walked up to Gonzales (another suspect), wagging his tail. Killian ordered Gonzales to "get over here" and said "I'll shoot your dog." The dog—Bruno—began to walk towards the officer in a non-threatening way and the officer shot Bruno three times.
- All captured on body camera

Ramirez v. Killian, 113 F.4th 415 (5th Cir. 2024)

Clearly Established:

- Neither party nor the District Court cited controlling case from our Circuit, and none exists.
- "[I]n the absence of directly controlling authority, a consensus of cases of persuasive authority might, under some circumstances, be sufficient to compel the conclusion that no reasonable officer could have believed that his or her actions were lawful."
- Looking, therefore, to the other circuits, we find a robust consensus that an officer may not, consistent with the Fourth Amendment, kill a pet dog unless he reasonably believes that the dog poses a threat and that he is in imminent danger of being attacked. We are far from the first to recognize and apply this rule—in fact, we are almost the last.

Ramirez v. Killian, 113 F.4th 415 (5th Cir. 2024)

Holding:

- Bruno had displayed no signs of aggression prior to approaching Killian. Mere seconds before Killian opened fire, Bruno had walked up to Gonzales wagging his tail.
- Therefore, the potential unlawfulness of Killian's shooting Bruno was apparent in light of pre-existing law.
- Killian was not entitled to qualified immunity for unreasonable seizure claim for the killing pet dog.

Rosenbaum v. City of San Jose, 107 F.4th 919 (9th Cir. 2024)

Facts:

- Kurt (the police dog) dragged Rosenbaum onto his stomach. The bodycam video shows Rosenbaum sliding down without resistance as Officer Dunn says "good boy." At least one officer's gun is drawn and pointed at Rosenbaum. Another officer stands on Rosenbaum's legs as Rosenbaum yells out for his partner and says, "he's bleeding me out."
- The video then shows one officer holding Rosenbaum's left arm behind his back while Kurt pulls Rosenbaum's right arm above his head, and a third officer planting his foot on Rosenbaum's right shoulder. Kurt continued to pull Rosenbaum's arm over his head, giving one last forceful shake before Officer Dunn commanded the dog to let go of Rosenbaum's arm."

Rosenbaum v. City of San Jose, 107 F.4th 919 (9th Cir. 2024)

Holding:

- A police officer violates the Fourth Amendment when he or she allows a police dog to continue biting a suspect who has fully surrendered and is under officer control.
- This is clearly established:
    - In Mendoza, we held that 'no particularized case law is necessary for a deputy to know that excessive force has been used when a deputy sicks a canine on a handcuffed arrestee who has fully surrendered and is completely under control.'" 27 F.3d at 1362.
    - We reaffirmed in Watkins that an officer violates clearly established law by allowing a police dog to continue biting a suspect after the suspect's surrender, even when the suspect is not handcuffed.
    - Qualified Immunity Denied.

Diei v. Boyd, 116 F. 4th 637 (6th Cir. 2024)

Facts:

- Plaintiff was a pharmacy student at University of Tennessee, who also had anonymous Instagram account, where she posted about "songs, fashion, and sexuality." Anonymous complaints about her account led her to meetings with school; plaintiff alleged that she was unaware of the (vague) policies) no discipline taken.
- Second anonymous complaint led to review. Professionalism standards committee decided that her posts violated college's technical and professionalism standards and voted to dismiss plaintiff. Plaintiff appealed and three weeks later dean reinstated her.
- Plaintiff filed § 1983 lawsuit, primarily on First Amendment. She sought declaratory, injunctive, and monetary relief. During litigation, she graduated.
- Defendants filed motion to dismiss and attached exhibits including student handbook and state Board of Pharmacy rules. Court granted motion to dismiss, concluding that nonmonetary claims were moot and plaintiff didn't state claim for damages, relying on the exhibits, concluding that the policies weren't vague, Plaintiff's posts weren't protected by the First Amendment, and Plaintiff suffered no adverse action.

Diei v. Boyd, 116 F. 4th 637 (6th Cir. 2024)

Holding:

- Injunctive claims were moot.
- Declaratory claims were seeking declarations of *past conduct*, which were inappropriate. (Declaratory relief, as a "predicate to a damages award" is inappropriate.)
- Court *could* take judicial notice of
  - Board of Pharmacy rules
- Court could *not* take judicial notice of
  - Student Handbook (Plaintiff alleged that her discipline wasn't based on handbook violations; and the policies in the handbook weren't "central" or referred to in the complaint)
  - Pledges signed by Plaintiff to abide by professionalism rules
  - Posts that formed the basis of the second investigation (though this was "close"
- Court of Appeals could review motion de novo without considering inappropriate exhibits

Diei v. Boyd, 116 F. 4th 637 (6th Cir. 2024)

Holding:

- Plaintiff's speech was protected
  - Did not identify school, "had no connection to her studies," and was not disruptive at school
  - Defendant's purpose of "training their students to comport with the norms of the pharmacy profession" was insufficient—other cases showed actual harassment, were targeted to students, and the like.
  - Plaintiff alleges she never saw conduct policies, and thus the court could not evaluate whether there was a pedagogical purpose in enforcing policies.
- Voting to expel plaintiff would chill a First Amendment speaker, even if she was given opportunities for appeal and she wasn't actually expelled.
- "Oftentimes, we need a fuller factual picture to define the contours of the right at issue to determine if it was clearly established, especially so in the First Amendment context" but at 12(b)(6) procedural posture Plaintiff's right to "to post online, under a pseudonym, about topics unrelated to her studies in a way that did not materially interfere with the pedagogical interests of the College" was clearly established (with a significant discussion of SCOTUS and 6th Circuit case law).

Couzens v. City of Forest Park, Ohio, 114 F. 4th 571 (6th Cir. 2024)

Facts:

- Pastor of church had extramarital affair; church membership went from 2000 to 200. Bank that held mortgage conditioned renegotiation of mortgage on pastor being fired; executive director let the church know of this, and pastor fired him. Church voted 97% to fire pastor.
- Church hired off-duty officers to make sure "nothing got crazy" on Sunday when announcement was made. Church told pastor he could attend service but could not lead it. Church gave officers letters showing that the pastor had been terminated and other information about the dispute. Pastor took the pulpit for a prayer; officers told wife that he had to leave; wife told pastor that police will "drag him out". Pastor came off; officers told pastor he had to leave and would be arrested if he didn't. Pastor left.
- Pastor brought § 1983 illegal seizure and free exercise claims (and conspiracy) against officers, city, *and* leaders of the church. Trial court granted summary judgment. Plaintiff appealed.

Couzens v. City of Forest Park, Ohio, 114 F. 4th 571 (6th Cir. 2024)

Holding:

- Officials were acting under color of law, based on city policy, use of uniforms, off-duty detail was arranged by city, threat of arrest by officers.
- Order by officers that the pastor could not remain at the church was a seizure. 6th Cir. precedent finds that's a seizure unless the space is "no longer open to the public" or that suspect's actions violated "rule, ordinance or law." Because facts show that pastor was still invited to attend church, he could show that he had right to be in the church.
- Seizure was not "unreasonable" based on information given by the church, even if information was contradictory. It was not "suspicious" and therefore can be relied upon by officers.
- No First Amendment violation because the individual didn't have a First Amendment right to lead the congregation in the face of the congregation's expression that they didn't want the pastor to lead the group. (Contrasted SCOTUS cases where Court has held that the state cannot interfere with a church's decisions to govern themselves, and there was no government policy that discriminated against the pastor's right to practice his religion)

Hughes v. Garcia, 100 F. 4th 611 (5th Cir. 2024)

Facts:

- Former police officer, driving for Uber, followed drunk driver on interstate, stopped behind after driver crashed, restrained driver with handcuffs, communicated with 9-11 the whole way. When police arrived drunk driver gave "crazy" account of events, said former officer identified himself as a police officer in effectuating the citizen's arrest
- Officers *let the drunk driver go.* Officers on the scene write a report, then affidavit of probable cause and on that basis charge the former police officer with impersonating an officer, a third-degree felony.
- Criminal charges are dismissed (with a statement that no PC existed); Uber driver sues for § 1983 for false arrest and malicious prosecution.
- Defendants moved to dismiss on qualified immunity; trial court denied. Defendants took interlocutory appeal

Hughes v. Garcia, 100 F. 4th 611 (5th Cir. 2024)

Holding: (Oldham, J.)

- "For those who worry that qualified immunity can be invoked under absurd circumstances: Buckle up…"
- Plaintiff pleaded sufficient claims.
- Independent intermediary doctrine did not shield officers because there were sufficient facts showingat least 8 intentional or reckless misstatements and omissions in warrant application, and warrant could not have supported PC without offending misstatements and omissions.
- Officer who did not submit the warrant affidavit was liable under bystander liability because the officer knew that the affidavit and report didn't accurately reflect the investigation and took no action.
- Law was clearly established; *Franks* clearly established the rule, and there wasn't any split-second decisions requiring more particularized facts.
- "It is unclear which part of this case is more amazing: (1) That officers refused to charge a severely intoxicated driver and instead brought felony charges against the Good Samaritan who intervened to protect Houstonians; or (2) that the City of Houston continues to defend its officers' conduct."

Gillmore v. Ga. Dep't of Corrs., 111 F. 4th 1118 (11th Cir. 2024)

Facts:

- Woman visiting her husband in prison was subject to strip search after "staring" at officers for a few minutes. Strip search included physical touching, fondling of breasts and physical touching between buttocks.

Holding:

- Search of people visiting incarcerated persons requires reasonable suspicion, even if inmates can be strip searched without suspicion.
- Law was not clearly established (*cf.* cases requiring reasonable suspicion for arrestees, students, boarder entrants).
- **"Robust consensus"** of persuasive authority from *other jurisdictions* **does not apply to clearly establish** law in Eleventh Circuit (SCOTUS references were dicta; 11th Cir. statements were about consensus of 11th Cir. decisions)

Rehearing en banc granted & vacated.

Honorable Mentions

- *Jarrard v. Sheriff of Polk County*, 115 F.4th 1306 (11th Cir. 2024)
  - Corrections, 1st Amendment, minister denied admission to the jail's voluntary ministry program.
  - "QI Denied because Plaintiff's right to be free from viewpoint discrimination and his right not to be subjected to decisionmakers' unbridled discretion were clearly established – both were firmly grounded in 'broad statements of principle" expressly articulated in governing caselaw."
- *Stapleton v. Lozano*, 125 F.4th 743 (5th Cir. 2025)
  - Police, 8th Amendment, deliberate indifference to serious medical need, suspect died in custody from combined drug toxicity.
  - Plaintiffs "were required to identify a case in which an officer who did not obtain medical treatment for a detainee exhibiting symptoms consistent with significant intoxication was held to have violated the constitution.' They did not.
  - QI granted because there was no constitutional violation, and it was not clearly established.
- *Mayfield v. Missouri House of Representatives*, 122 F.4th 1046 (8th Cir. 2024)
  - Legislature, 1st Amendment, former House Representative terminated for sending emails advocating for the use of masks in the Capitol building during the COVID-19 Pandemic.
  - QI denned because "Rep had a First Amendment right to speak on a matter of public concern as a public employee, and that right was clearly established in August 2020."

Honorable Mentions

- *Garraway v. Cuifo*, 113 F. 4th 1210 (9th Cir. 2024); *Mohamed v. Jones*, 100 F. 4th 1214 (10th Cir. 2024) (both concluding that there's no interlocutory appeal of trial court's decision that *Bivens* remedy exists, in absence of an asserted claim of qualified immunity). Judge Bumatay dissents in *Garraway*, arguing that separation of powers requires interlocutory appeal. Judge Tymkovich dissents in *Mohamed*, arguing that *Bivens* is no longer cognizable and collaterally appealable. 1th Circuit still considering.
- *Beard v. Falkenrath*, 97 F. 4th 1109 (8th Cir. 2024) (officers who cut off transgendered inmate's "shirt, skirt, bra, and socks," while parading her through facility taking her to "rubber room" for failing to comply with male-only clothing requirements were not entitled to QI for 4th Am. strip search claim, but were entitled to QI on equal protection claim, because there was no clearly established right for transgendered inmates to wear preferred clothing, preferred pronouns, and no 1st A. "expressive conduct" right to those same actions)
- *Chinaryan v. City of Los Angeles*, 113 F. 4th 888 (9th Cir. 2024) (trial court erred in granting MSJ to offers on qualified immunity when they engaged in "high risk" arrest of suspect based only on reasonable suspicion of vehicle theft, even though case went to trial on *Monell* claim and jury found that "officers" did not use excessive force, dissent by Judge Forrest, cert pending)

Qualified immunity in 2025 and beyond

Federal Bar Association

Voice of the Federal Bar and Bench

Navin Rajagopalan, “Dippin’ Dots – Cookies n Cream ,” https://bit.ly/3x78oqE CC BY-SA 2.0

Navin Rajagopalan, “Dippin’ Dots – Cookies n Cream ,” https://bit.ly/3x78oqE CC BY-SA 2.0

Qualified immunity – 2025?

- Quiet SCOTUS OT2024 for QI
  - No cases squarely addressing QI in any significant way
- SCOTUS continues to refuse petitions seeking to overturn or reform QI
- Congress introduces QI-ending legislation (S.1196, H.R. 2847 (2023)) there has still been no action.

Qualified immunity – Is it iced?

Article · Volume 111 · February 2023 · Alexander A. Reinert

Qualified Immunity's Flawed Foundation

Qualified immunity has faced trenchant criticism for decades, but recent events have renewed focus on this powerful defense to liability for constitutional violations. This Article takes aim at the roots of the doctrine—fundamental errors that have never been excavated. First, this Article demonstrates that the Supreme Court's qualified immunity jurisprudence is premised on a flawed application of a dubious canon of statutory construction—namely, that statutes in "derogation" of the common law should be strictly construed. Applying the Derogation Canon, the Court has held that 42 U.S.C. § 1983's silence regarding immunity should be taken as an implicit

Section 1983—and made clear that such a claim would be viable notwithstanding "any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary."[28] For reasons unknown, this critical clause (for purposes of this Article, I will call it the "Notwithstanding Clause") was omitted when the Reviser of the Federal Statutes, who lacked any authority to alter positive law, published the first compilation of federal law in 1874.[29] That error was compounded when the Revised Statutes were collected in the United States Code.[30] But because the common law of immunity for state actors, to the extent any existed, was generally state law immunity, Section 1983's original text conveys congressional intent that immunity defenses should not apply to the newly created civil rights actions. What's more, this reading is confirmed by contemporaneous legislative history and other provisions of the Civil Rights Act of 1871.[31]

16 Crucial Words That Went Missing From a Landmark Civil Rights Law

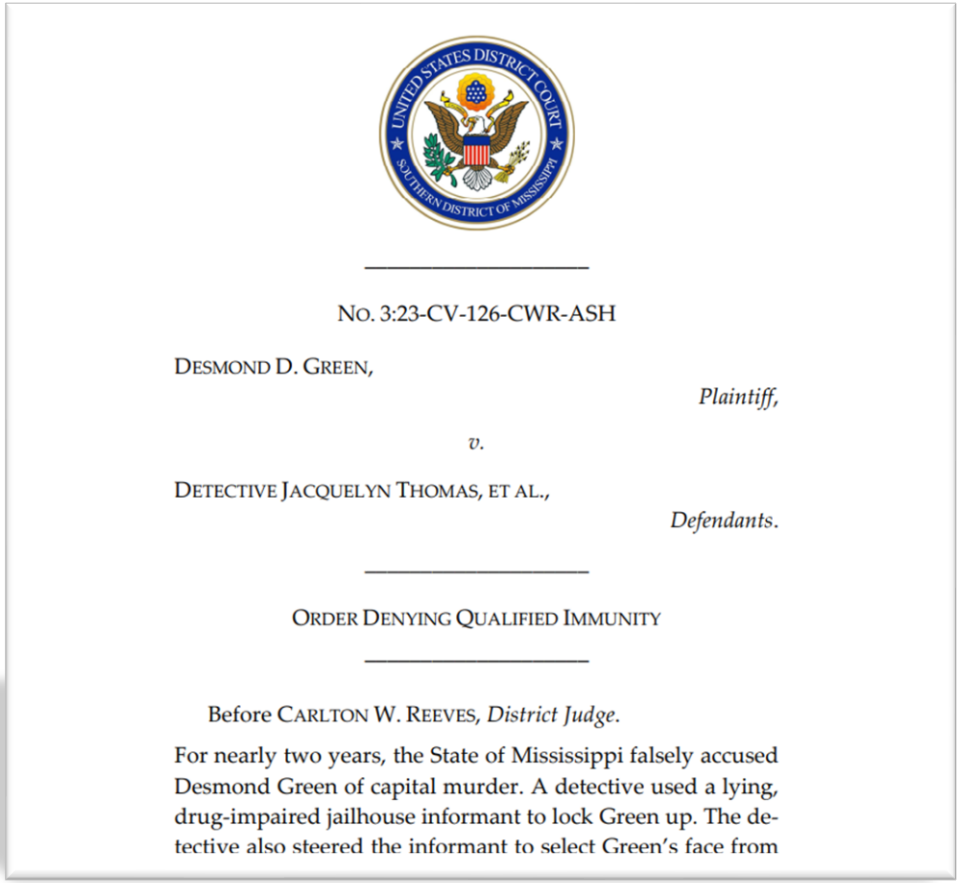
The phrase, seemingly deleted in error, undermines the basis for qualified immunity, the legal shield that protects police officers from suits for misconduct.

Share full article · 53

"Wait, what?"

Rogers v. Jarrett, 63 F. 4th 971, 979 (5th Cir. 2023) (Willett, J., concurring to his own opinion).

Judge Reeves ~~strikes~~ writes again!



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI

No. 3:23-CV-126-CWR-ASH

DESMOND D. GREEN,

Plaintiff,

v.

DETECTIVE JACQUELYN THOMAS, ET AL.,

Defendants.

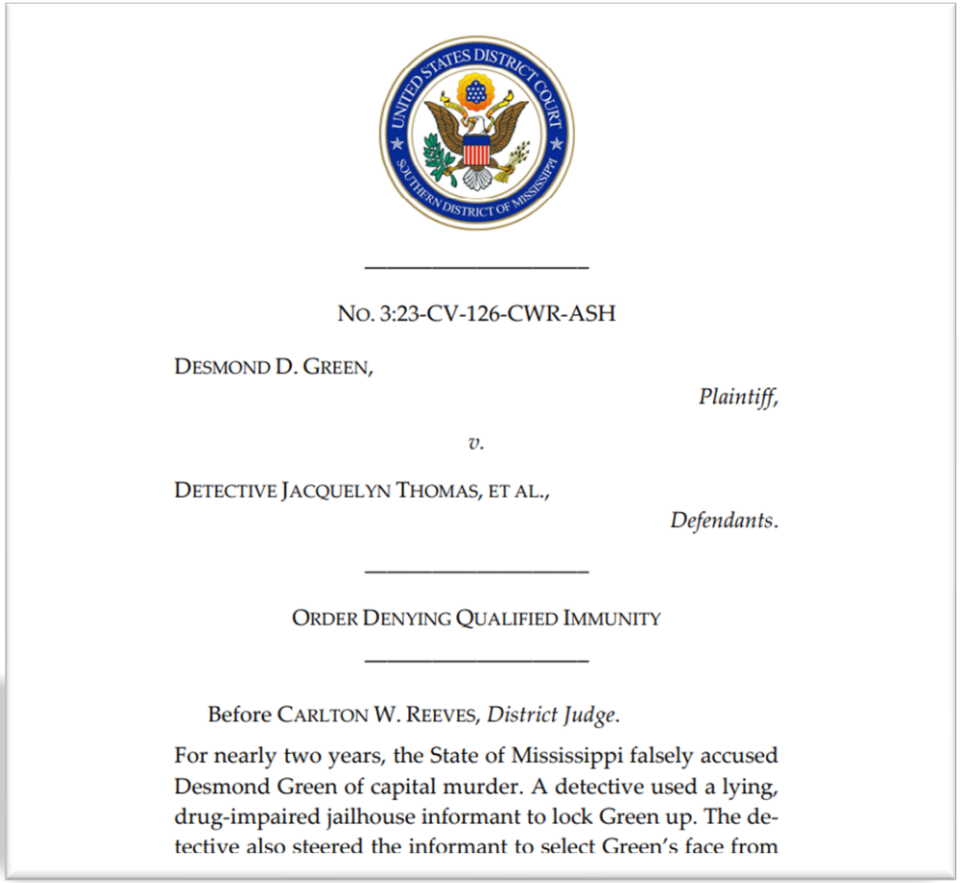
ORDER DENYING QUALIFIED IMMUNITY

Before CARLTON W. REEVES, *District Judge.*

For nearly two years, the State of Mississippi falsely accused Desmond Green of capital murder. A detective used a lying, drug-impaired jailhouse informant to lock Green up. The detective also steered the informant to select Green's face from

- Green v. Thomas, 734 F. Supp. 3d 532 (S.D. Miss. 2024)
- Plaintiff held for nearly two years on murder charge based on alleged manipulated jailhouse informant testimony and exculpatory evidence withheld from grand jury.
- After release, plaintiff sued for § 1983 4th Amendment false arrest, 14th Amendment (procedural) due process, 4th Amendment malicious prosecution, + state law claims
- Defendant moved to dismiss on, among others, qualified immunity grounds.

Judge Reeves ~~strikes~~ writes again!



No. 3:23-CV-126-CWR-ASH

DESMOND D. GREEN,

Plaintiff,

v.

DETECTIVE JACQUELYN THOMAS, ET AL.,

Defendants.

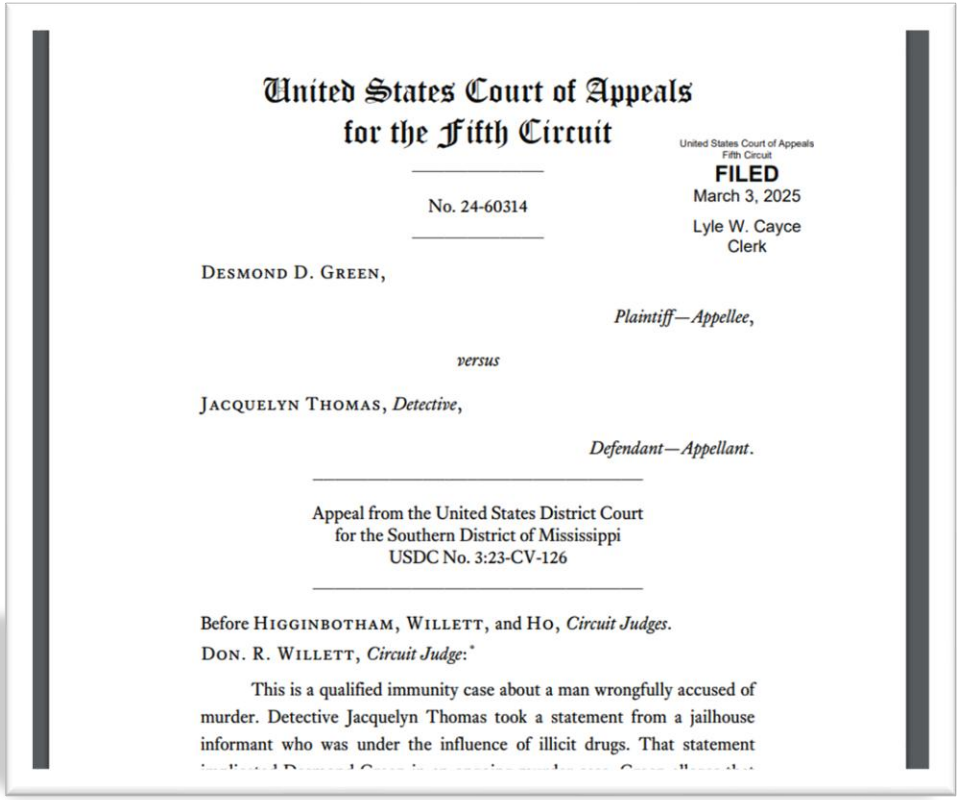
ORDER DENYING QUALIFIED IMMUNITY

Before CARLTON W. REEVES, *District Judge.*

For nearly two years, the State of Mississippi falsely accused Desmond Green of capital murder. A detective used a lying, drug-impaired jailhouse informant to lock Green up. The detective also steered the informant to select Green's face from

- Judge Reeves concluded that Thomas was not entitled to qualified immunity
- The *then* agreed with Plaintiff that qualified immunity was based on "unsound law":
  - It is anti-democratic
  - It is counter-textual (citing Reinert paper)
  - It is wholly wrong and an attempt by the Court to inject itself into public debate (citing to ***Dobbs***)
- Recognizing that he had "no say in the adjustment or abolition of qualified immunity," concluded that *"Desmond Green has suffered two injustices. The judiciary should not impose a third. If qualified immunity would do that, closing the courthouse doors to his claims, then the doctrine should come to its overdue end."*

Fifth Circuit splats the scoop?



United States Court of Appeals
for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
March 3, 2025
Lyle W. Cayce
Clerk

No. 24-60314

DESMOND D. GREEN,

Plaintiff—Appellee,

versus

JACQUELYN THOMAS, *Detective*,

Defendant—Appellant.

Appeal from the United States District Court
for the Southern District of Mississippi
USDC No. 3:23-CV-126

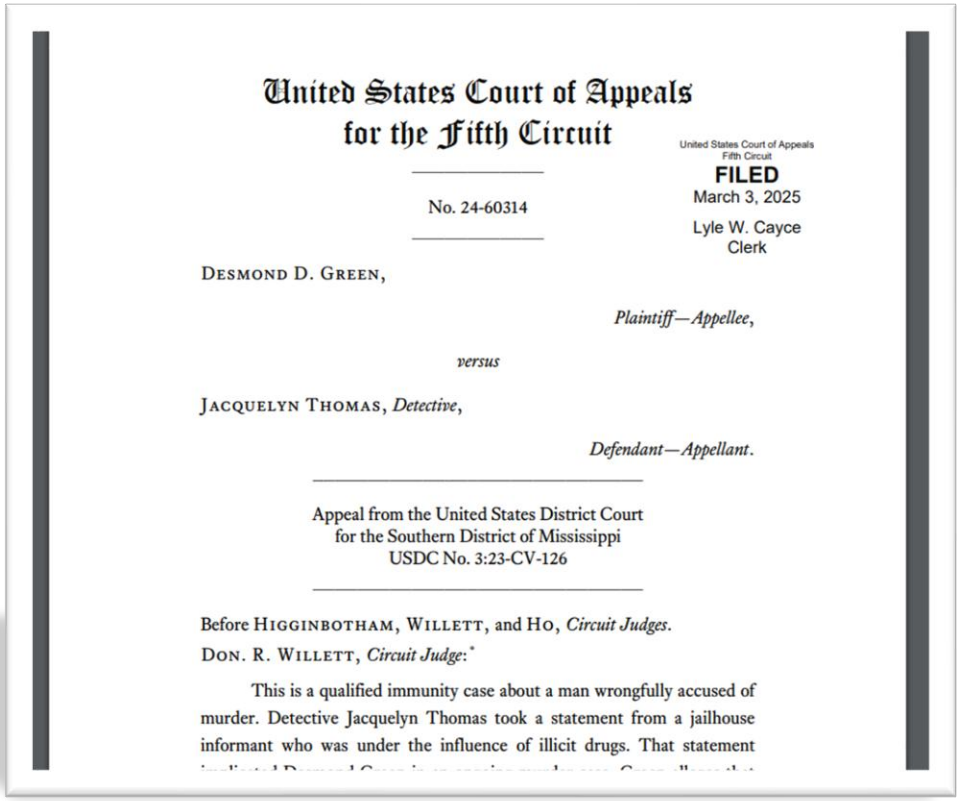
Before HIGGINBOTHAM, WILLETT, and HO, *Circuit Judges*.

DON. R. WILLETT, *Circuit Judge*:*

This is a qualified immunity case about a man wrongfully accused of murder. Detective Jacquelyn Thomas took a statement from a jailhouse informant who was under the influence of illicit drugs. That statement

- 129 F.4th 877 (5th Cir. March 3, 2025)
- Higginbotham, Willett, Ho, Judges.
- Opinion without oral argument
- "But given our role as "middle management circuit judges, we must follow binding precedent. The district court is not free to overturn our circuit's precedent, nor are we permitted to overturn the Supreme Court's. We readily acknowledge the legal, social, and practical defects of the judicially contrived qualified-immunity doctrine, but we are powerless to scrap it."

Fifth Circuit splats the scoop?



United States Court of Appeals
for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
March 3, 2025
Lyle W. Cayce
Clerk

No. 24-60314

DESMOND D. GREEN,

Plaintiff—Appellee,

versus

JACQUELYN THOMAS, *Detective*,

Defendant—Appellant.

Appeal from the United States District Court
for the Southern District of Mississippi
USDC No. 3:23-CV-126

Before HIGGINBOTHAM, WILLETT, and HO, *Circuit Judges.*

DON. R. WILLETT, *Circuit Judge:*[*]

This is a qualified immunity case about a man wrongfully accused of murder. Detective Jacquelyn Thomas took a statement from a jailhouse informant who was under the influence of illicit drugs. That statement

- BUT
  - **Denies** Qualified Immunity on 4th Amendment, 14th Amendment Due Process claims
  - Grants Qualified Immunity on 4th Amendment malicious prosecution claim, because no 4th Amendment malicious prosecution claim existed in 2020, at the time of the events.
- AND

---

[*] JUDGE HO concurs in the judgment.

SCOTUS Cert? Probably not.

Questions?

The mission of the Federal Bar Association is to strengthen the federal legal system and administration of justice by serving the interests and the needs of the federal practitioner, both public and private, the federal judiciary and the public they serve.

4075 Wilson Blvd., 8th Floor, Arlington, VA 22203

T: (571) 481-9100 F: (571) 481-9090 fba@fedbar.org www.fedbar.org

Voice of the Federal Bar and Bench

Federal Bar Association